No. 89-1972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JAMES B. DANIELS, AN ATTORNEY-AT-LAW
OF THE STATE OF NEW JERSEY,
Petitioner,

v.

SUPERIOR COURT OF THE STATE OF NEW JERSEY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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QUESTIONS PRESENTED

1. Whether petitioner's voluntary payment of the fine, which was the only punishment imposed in the contempt judgment on *de novo* review by the Superior Court of New Jersey, Appellate Division, renders this petition moot?

2. Whether petitioner may attack the constitutionality of a state statute as vague and overbroad without having raised these claims in the state courts?

3. Whether the state Supreme Court's interpretation of the statutory definition of contempt, requiring an imminent and direct tendency to obstruct justice, violated petitioner's right to due process?

4. Whether the state court's factual findings were sufficient to support the contempt adjudication against claims that petitioner's conduct was protected by the first amendment right to freedom of speech and the sixth amendment right of petitioner's former client to vigorous representation of counsel?

5. Whether an experienced criminal trial attorney cited for direct contempt in the face of the court should be permitted to frustrate proceedings designed to restore order in the courtroom by claiming the right to assistance of counsel at a summary contempt hearing?

6. Whether *ex parte* affidavits by petitioner and a court attendant submitted by petitioner's counsel on *de novo* appeal of a summary contempt adjudication were admissible to convert the matter from a direct contempt to an indirect contempt proceeding, entitling petitioner to a full evidentiary hearing?

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COUNTER-STATEMENT OF THE CASE

A. Procedural History

At a hearing on March 18, 1986, petitioner interrupted the trial court's ruling on a defense motion with derisive laughter and offensively disrespectful physical gestures designed to provoke a response and disrupt the proceedings in a blatant effort to influence subsequent rulings. The court warned petitioner that such conduct was unacceptable and if it continued, the court would take appropriate action. Petitioner's belligerent response to the trial court's warning necessitated a sterner second warning that further misbehavior would result in a contempt citation. (T90-16 to 91-11). After a recess petitioner apologized. (T91-18 to 22). However, on the following day, March 19, 1986, petitioner again interrupted the court's ruling on another motion with a similarly egregious demonstration of disrespect. (2T127-18 to 128-9). As the court was admonishing petitioner, he interrupted the proceedings by jumping to his feet, angrily denying the conduct observed by the court, and stating that he was tired of such criticism. It was at this point that the court cited petitioner for contempt and afforded him the opportunity to address the issue of intent and the sentence. (2T128-13 to 129-30). Petitioner was adjudged in contempt and sentenced to two days in county jail and a fine of $500. (2T132-20 to 133-8).

Shortly thereafter, petitioner submitted a form of order which failed to conform with the requirements of *N.J. Ct. R.* 1:10-1, but the court signed the order (Pa205) as an accommodation to petitioner since there was no secretarial assistance available to make additions. (Pa210). Later that day petitioner filed an appeal and obtained a stay. (Pa207). The trial court filed an Order of Contempt and Certification on March 24, 1986. (Pa209). Petitioner did not object to the form or contents of the Order of Contempt and Certification, nor did he file a timely motion for new trial pursuant to *N.J. Ct. R.* 3:20-2.

On May 2, 1986 petitioner moved to supplement the appellate record with his own *ex parte* affidavit (Pa231)

and the affidavit of a court attendant, James Tighe. (Pa236). Alternatively, petitioner requested a remand to take testimony, which was tantamount to an untimely motion for new trial. Respondent opposed this motion since petitioner was seeking to convert this direct contempt into an indirect contempt proceeding to obtain a full evidentiary hearing. In orders dated May 22 and June 2, 1986 (Pa229), the Appellate Division granted petitioner's motion to supplement the record with these affidavits but denied his alternative request for remand to take testimony. On June 11, 1986, respondent moved to supplement the record with an affidavit of the trial prosecutor, Thomas Simon, which corroborated the trial court's certification and showed that petitioner's affidavit of May 2, 1986 deliberately misrepresented a conversation with an eyewitness and completely altered its meaning. The Appellate Division granted respondent's motion on July 10, 1986.

The Appellate Division filed its opinion on July 30, 1987, finding petitioner guilty of contempt and imposing a fine of $500. It deemed the fine adequate punishment and vacated the custodial portion of the sentence imposed by the trial court. (Pa67). *Matter of Daniels*, 219 *N.J. Super.* 550, 530 *A.*2d 1260 (App. Div. 1987). Petitioner voluntarily paid this fine on or about August 10, 1987.

Petitioner filed a Notice of Petition for Certification and Notice of Appeal to the Supreme Court of New Jersey on August 21, 1987. On February 28, 1990, the Supreme Court of New Jersey filed its opinion affirming the judgment of the Appellate Division. (Pa1). *Matter of Daniels*, 118 *N.J.* 51, 570 *A.*2d 416 (1990).

B. Statement of Facts

During the first day of pretrial hearings in a robbery case, petitioner engaged in a prolonged effort to relitigate denials of his repeated motions seeking admission of unstipulated defense polygraph evidence. The trial judge was indulgent of petitioner's refusal to accept the court's rulings and his defiance of court directions to limit and terminate this repetitive argument. (Pa162). Petitioner's

conduct, however, degenerated and culminated in a blatantly disrespectful display of disagreement that disrupted the court proceedings as the trial judge was rendering a ruling on the issue. Petitioner candidly admitted in his Appellate Division brief (at p. 14) that he disrupted the court's ruling with his rude non-verbal conduct to demonstrate his disagreement in an attempt to "influence subsequent decisions" in the case. This demonstration consisted of mocking laughter audible to the trial judge and the prosecutor and offensively disruptive physical gestures including shaking his head, holding his head down, moving about in his seat and rolling his eyes. (T90-22 to 24; 2T129-15 to 18; Pa211). Even as petitioner demonstrated this disrespect and "flaunted the court's authority" (Pa162), the trial judge exercised commendable restraint, properly warning petitioner:

> Mr. Daniels, I frankly don't care about your response but if you continue to do that, sir, I'm going to take appropriate action. (T90-16 to 18).

Petitioner's response to this warning was belligerently defiant, in the Appellate Division's view daring the court to take further action (Pa163):

> Your Honor, go right ahead, take whatever appropriate action Your Honor deems necessary. (T90-19 to 21).

In his certification the trial court described petitioner's disrespectful, sarcastic tone of voice (Pa213), but the judge endeavored to defuse the situation rather than react to petitioner's provoking words. (*Id.*; see also Pa95). Thus, the judge issued a sterner second warning. (T90-24 to 91-11). Following a recess, petitioner apologized.

During continuation of these pretrial proceedings the next day, March 19, 1986, however, petitioner defied the court's directive and repeated his misbehavior, again rudely disrupting the trial court's ruling with a similar non-verbal demonstration of disagreement. Again, petitioner's mocking laughter was audible to the trial judge, and petitioner

engaged in offensive physical gestures, throwing himself back in his chair, rolling his head, and covering his eyes. (2T128-7 to 9; Pa213; see also Pa95).

In his affidavit supplementing the record in the Appellate Division, Assistant Prosecutor Thomas Simon corroborated the court's description of petitioner's misconduct:

> I was seated at counsel table as the judge was making his ruling. I was straining at times to hear the Judge. As I was watching the Judge, I saw the Judge direct his attention to Mr. Daniels, who was seated at defense counsel's table. As the Judge turned toward him I also turned and looked at Mr. Daniels. As I did, I could see that Mr. Daniels was seated in his chair waving his hands, shaking his head, and making laughing gestures (although I could hear no laughing).

The prosecutor explained why he had difficulty hearing the judge and could not hear petitioner's laughter:

> It should be noted that the courtroom conditions at that time made it necessary for several windows to be open. The Court was located on the thirteenth floor of the Union County Court House, and it was quite windy. The audibility was quite poor in the Court at that time.

It is understandable that some eyewitnesses may not have been able to hear audible laughter. The Appellate Division found no conflict in any material respect among the affidavits of Tighe, Simon and Daniels, the transcript of the proceedings and the judge's certification of March 24, 1986. (Pa117-119).

In response to petitioner's disruptive conduct, the judge began to admonish petitioner, but before he could finish describing petitioner's misbehavior for the record, petitioner jumped up from his seat and rudely interrupted the court (Pa216) to voice his angry denial and declare that he was tired of the court's criticism:

> Judge, I didn't, I did neither of these things (sic), none of them, zero. And I'm tired of this kind of stuff. (2T128-10 to 12).

Since petitioner refused to accept criticism or to control his misbehavior in accordance with the prior warnings, the trial court cited petitioner for contempt:

> I find you in contempt of court. You'll be able to respond right now. (2T128-13 to 14).

This citation was followed by petitioner's angry tirade which confirmed his contemptuous intent.

In his certification the trial judge explained that although he used the term "find" on several occasions, his use of this term initially was in effect a notification of the contempt citation. It was not until after petitioner was given an opportunity to be heard with regard to his *mens rea* and sentencing that he was actually held to be in contempt of court. (Pa215-216).

Offered this opportunity to explain his conduct, petitioner emitted another scornful laugh (Pa217), and the court observed on the record, "I find you are laughing and smiling again." (2T129-20). Petitioner launched into an angry rationalization of his conduct (Pa217), accusing the court of bias against him and acting as "a second prosecutor throughout these proceedings." (2T129-24 to 130-5). Petitioner vacillated between completely denying any misbehavior and admitting his physical gestures of throwing himself back, covering his eyes and nodding his head. Again, petitioner attempted to rationalize his demonstration as a human reaction to his disappointment with the ongoing court rulings. His explanation became so angry and heated that the judge found it necessary to admonish petitioner to lower his voice. Petitioner responded,

> I'm sorry, I am obviously human and angry. I'm trying to show the most respect that I can for *this* Court." (2T130-25 to 131-10).

Petitioner emphasized the word "this," and the inflection of his voice was disrespectful and offensive. (Pa217-218).

He became more sarcastic, also observing that his disagreements with the court were part of "the nature of the game" and that this display of disagreement was his responsibility and function as advocate for his client. (2T131-11 to 132-5). Thus, he again confirmed that his behavior was willful and designed to influence the court. The trial court found petitioner's attempt to prove a lack of *mens rea* disingenuous. (Pa218; see also Pa97).

In reviewing petitioner's explanation for his behavior, the Appellate Division found "the manner in which [petitioner] addressed the trial court when given the opportunity to be heard was likewise insolent. Thus, the trial judge was warranted in holding [petitioner] in contempt." (Pa163). The Appellate Division also found that petitioner gave a lengthy explanation for his conduct, thus enjoying a full right of allocution, and "[h]is assertion to the contrary is unfounded." (Pa137).

At the conclusion of petitioner's "tirade," the trial court inquired if petitioner wished to say anything further in his defense. When he said "No," the court asked if he wished to call any witnesses. Instead of answering this question, petitioner asked for a few moments. (2T132-6 to 12). The court pressed him for an answer, but petitioner again avoided the question by responding, "I would like to consult with an attorney." (2T132-13 to 16). The Court reminded petitioner that it was a summary contempt hearing and asked a third time, "Do you want to call a witness?" Petitioner immediately responded, "No." (2T132-17 to 19). Thus, petitioner declined to offer any additional evidence or call any witnesses when given the opportunity to do so. (Pa219).

The trial court proceeded to render findings holding petitioner in contempt and sentencing him. (2T132-20 to 133-10). The court instructed the bailiff to bring out the unsworn jury, and the court discharged the jury after the termination of the contempt adjudication. (2T133-11 to 22).

REASONS FOR DENYING THE WRIT

POINT I

PETITIONER'S VOLUNTARY PAYMENT OF THE FINE, WHICH WAS THE ONLY PUNISHMENT IMPOSED IN THE CONTEMPT JUDGMENT ON DE NOVO REVIEW BY THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, RENDERS THIS PETITION MOOT.

Petitioner remitted payment of the fine imposed by the Appellate Division in the form of a check to the Union County Court Clerk dated August 10, 1987, apparently without reservation or protest. It is noteworthy that the judgment did not provide for commitment to jail for non-payment of the fine. The remedy for non-payment of a fine requires a motion by the person authorized to collect payment and a hearing. *N.J.Stat.Ann.* 2C:46-2. Petitioner was not impeded or prevented by any procedure from taking those steps necessary to preserve a subject matter on which the judgment of this Court could operate. Immediately after the judgment of contempt he took advantage of the court rule, *N.J. Ct. R.* 2:9-5(a), permitting a stay of sentence pending his appeal to the Appellate Division. (Pa 207). Obviously, he could have applied for continuation of the stay pending his appeal to the Supreme Court of New Jersey and to this Court, but he voluntarily chose not to do so. Under these circumstances petitioner did not exercise available procedures to maintain a live case or controversy, and the appeal is moot.

The Constitution confines the jurisdiction of this Court, indeed all federal court jurisdiction, to "cases" and "controversies." U.S. Const. Art. III, sec. 2. Generally, a case becomes moot, and therefore, nonjusticiable as involving no case or controversy, "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *United States Parole Commission v. Geraghty*, 445 *U.S.* 388, 396 (1980), quoting *Powell v. McCormack*, 395 *U.S.* 486, 496 (1969). In this case a reversal of the judgment of the Superior Court of New Jer-

sey will provide petitioner with no actual, affirmative relief, since the sentence has already been executed. *E.g.*, *Taylor v. United States*, 410 *F.*2d 392 (5th Cir. 1969) (payment of fine moots appeal); *accord*, *United States v. Lee*, 404 *F.*2d 68 (5th Cir. 1968); *Murrell v. United States*, 253 *F.*2d 267 (5th Cir. 1958), *cert.* den. 358 *U.S.* 841 (1958); *D'Aloia v. City of Summit*, 89 *N.J.L.* 711, 99 *A.* 1070 (E. & A. 1916); *Westfield v. Stein*, 113 *N.J.L.* 1, 172 *A.* 522 (Sup. Ct. 1934); *State v. Heath*, 18 *N.J. Misc.* 471, 15 *A.*2d 92 (Cty. Ct. 1940); Annotation, *Appealability of Contempt Adjudication or Conviction*, 33 *A.L.R.*3d 448, 573 (1970).

Of course, the seminal case on this issue was *St. Pierre v. United States*, 319 *U.S.* 41 (1943). It held that completion of a six month sentence for contempt prior to argument on the merits of the appeal from the contempt conviction rendered the appeal moot, stating "the case is moot because, after petitioner's service of his sentence and its expiration, there was no longer a subject matter on which the judgment of this Court could operate." *Id.* at 42. In *dicta St. Pierre* recognized two possible exceptions to the mootness doctrine, and these exceptions have evolved and have been expanded in subsequent case law. The first exception exists where the State effectively denies the appellant access to its appellate courts before expiration of the sentence, preventing an opportunity to preserve a subject matter on which the judgment of the court can operate; the second exception permits adjudication of the merits where either state or federal law provide for collateral legal consequences on the basis of the challenged conviction. *Sibron v. New York*, 392 *U.S.* 40, 51-55 (1968), citing *St. Pierre v. United States*, *supra*. While *Sibron* did not overrule *St. Pierre*, the Court there cautioned that *St. Pierre* "must be read in [the] light of later cases to mean that a criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction." 392 *U.S.* at 57; *accord*, *Pennsylvania v. Mimms*, 434 *U.S.* 106, 109 n.3 (1977). *Sibron* and

Mimms, however, do not preclude respondent from rebutting the presumption of collateral legal consequences.

As the Supreme Court of New Jersey held in this matter:

> We find in the circumstances of this case that the attorney has not suffered a consequence of magnitude by virtue of the appellate disposition. The adjudication of contempt is not an adjudication of criminal conduct on the part of the attorney. (Pa62).

See also *In re Buehrer*, 50 *N.J.* 501, 518, 236 *A.*2d 592, 601 (1967). Nothing could be clearer: petitioner has not been adjudged guilty of criminal conduct. Indeed, under the state criminal code a criminal "offense" is expressly defined to mean "a crime, a disorderly persons offense or a petty disorderly offense unless a particular section in this code is intended to apply to less than all three." *N.J.Stat.Ann.* 2C:1-14(k); see also *N.J.Stat.Ann.* 2C:1-4(b). A contempt adjudication under the court rule does not fall within these definitions, and a person adjudged in contempt under the court rule does not suffer the collateral legal consequences ordinarily associated with a criminal conviction.

In this respect petitioner is not subject to impeachment in any proceeding or matter under the provision of *N.J.Stat.Ann.* 2A:81-12. There is no statutory provision for any legal disqualification or disability based on an adjudication of contempt. *N.J.Stat.Ann.* 2C:51-1. The judgment does not constitute a prior criminal record, a potential aggravating factor in a sentencing proceeding, and it could not be considered to enhance a subsequent conviction. *N.J.Stat.Ann.* 2C:44-1(a). While theoretically petitioner's conduct might be the subject of future disciplinary action or might be considered by a future employer or a bar admission authority, such actions would not be governed by any recorded judgment but would be more directly influenced by the underlying conduct that formed the basis of the judgment. See *Lane v. Williams*, 455 *U.S.* 624, 633-634 (1982). Moreover, in the four years since this matter

arose, no disciplinary action has ensued. The matter has been laid to rest because the Appellate Division felt the fine and rebuke in open court "undoubtedly impressed upon [petitioner] the seriousness of his conduct and should deter him from similar acts in the future." (Pa179-180). The potential for moral stigma, in contrast to a possible loss of legal rights, is not sufficient to avoid mootness. *St. Pierre v. United States*, 319 *U.S.* at 43; *United States v. Johnson*, 801 *F.*2d 597, 600 (2d Cir. 1986).

Surely, petitioner cannot seriously contend that a claim to reimbursement presents this Court with a special and important ground for *certiorari* when he did not exercise available measures to preserve a live case or controversy but voluntarily remitted payment of the nominal fine without coercion or protest. Since mootness is a jurisdictional issue, the petition should be dismissed.

POINT II

THE DEFINITION OF CONTEMPT IN FACIA CURIAE ANNOUNCED BY THE STATE SUPREME COURT PASSES CONSTITUTIONAL MUSTER.

Petitioner broadly claims that his derivative constitutional right of vigorous advocacy and his right of free expression were violated by the definition of contempt *in facia curiae* employed by the Supreme Court of New Jersey in this matter. His method of analysis is greatly flawed by a mischaracterization of the holding below, and his liberal intermixing of inapposite authorities that address indirect contempt, *i.e.* for conduct occurring outside the courtroom which is not seen by the judge. Petitioner presents the conclusory contention that the opinion below contains unbridled standards, that it delegates an unacceptable level of discretion and that it fosters arbitrary and discriminatory application. Examining the opinion below, it is plain that the definition is not open-ended and expansive as petitioner contends.

The state Supreme Court began by acknowledging that the power to punish summarily for contempt is an ex-

traordinary power to be exercised sparingly and only in the rarest of circumstances, that necessity "justifies the summary contempt power, but also limits that power by defining both settings for its exercise and procedural safeguards." (Pa29). The opinion incorporated all of the constitutional limitations and procedural requirements with respect to the contempt power that this Court has enunciated, repeating the primary limitations in a list of six steps the state courts must take in the course of determining whether to invoke the contempt power and if summary procedures are necessary. (Pa44-48). Thus, the Court explained and provided explicit guidelines concerning these constitutional restrictions on the summary contempt power, encouraging the state courts to employ alternative measures if practicable to avoid the need for adjudication.

In applying these principles to this case, the state Supreme Court agreed "substantially with the reasoning of the dissenting member of the Appellate Division and the result of the majority." (Pa48). We must turn to the reasoning of the dissent to fully appreciate the state Supreme Court holding. The dissent explained that while the common law definition of contempt has been expressed in more expansive terms than the federal courts, any difference is more semantic than substantive:

> . . . it is important not to overstate the magnitude of the difference between the federal and New Jersey standards for contempt. Our cases state as strongly as the federal cases that the summary contempt power should be invoked only in circumstances where it is necessary. *Compare Taylor v. Hayes*, 418 *U.S.* 488, 496-500, 94 *S.Ct.* 2697, 2702-2704, 41 *L.Ed.*2d 897 (1974) and *Harris v. United States*, 282 *U.S.* 162, 167, 86 *S.Ct.* 352, 355, 15 *L.Ed.*2d 240 (1965) with *In re Yengo*, 84 *N.J.* 111, 122[, 417 *A.*2d 533] (1980), *cert.* den. 449 *U.S.* 1124, 101 *S.Ct.* 941, 67 *L.Ed.*2d 110 (1981) and *In re Mattera*, [34 *N.J.* 259, 272, 168 *A.*2d 38 (1961)]. Furthermore, there are federal constitutional limitations upon a state court's exercise of the summary contempt power. See, *e.g.*, *Eaton v. Tulsa*,

> [415 *U.S.* 697 (1974)]; *Mayberry v. Pennsylvania*, 400 *U.S.* 455, 91 *S.Ct.* 499, 27 *L.Ed.*2d 532 (1971); *Holt v. Virginia*, 381 *U.S.* 131, 85 *S.Ct.* 1375, 14 *L.Ed.*2d 290 (1965); *In re Little*, 404 *U.S.* 553, 92 *S.Ct.* 659, 30 *L.Ed.*2d 708 (1972). For a party's conduct to be punishable as contempt, it "... must constitute an imminent, not merely a likely, threat to the administration of justice." *Eaton v. Tulsa, supra*, 415 *U.S.* at 698, 94 *S.Ct.* at 1229, quoting *Craig v. Harney*, 331 *U.S.* 367, 376, 67 *S.Ct.* 1249, 1255, 91 *L.Ed.*2d 1546 (1947).
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> * * *
>
> Therefore, while I agree with the majority's conclusion that conduct in our courts which has a "tendency to" obstruct the administration of justice may be contempt, I would conclude that the tendency must be immediate and direct before the "necessity" for invocation of the contempt power can arise. (Pa186-189).

In his brief to the state Supreme Court (at p.24), petitioner acknowledged that

> Judge Skillman [the dissent] may well be correct that there is little difference between the two standards. His conclusion that under this State's standard the contempt power cannot be invoked unless conduct has an immediate and direct tendency to obstruct the administration of justice ... may, as interpreted, coincide precisely with the federal standard.

Petitioner argued that under Judge Skillman's standard, and under the New Jersey cases, his conduct would not constitute contempt. Both the majority and the dissent rejected petitioner's position and found that petitioner's conduct was in the presence of the court and was subject to summary adjudication as an immediate and direct obstruction. (Pa180). Judge Skillman parted company with the majority only with respect to his conclusion that the two supplemental affidavits created a sufficient dispute

about the audibility of petitioner's laughter to convert the matter from a direct to an indirect contempt, requiring a remand for a full plenary hearing.

Applying the reasoning of the dissent on the definition of contempt, the state Supreme Court held that "if the underlying conduct occurred as found, the judgment of contempt was warranted." (Pa48). The Court had noted,

> When an attorney's conduct in the actual presence of the court has the *capacity to undermine the court's authority and to interfere with or obstruct the orderly administration of justice*, there can be no alternative but that a trial court assume responsibility to maintain order in the courtroom. (emphasis added) (Pa28)

Petitioner extracts the phrase "capacity to undermine" out of context in support of his contention that the definition is open-ended and expansive, when it is clear from the opinion that it included the requirement of obstruction and applied the test from the dissent which petitioner had told the Court "may well be correct" and "coincides precisely with the federal standard." If petitioner's legal posturing is disregarded, it is obvious that his real dispute is with the factual findings of the state courts and not with the minor differences between the definition of contempt in the state and federal systems.

A. The New Jersey Definition of Contempt Is Neither Vague Nor Overbroad.

Petitioner claims for the first time that the statutory definition of contempt in *N.J.Stat.Ann.* 2A:10-1, as construed by the opinions below, is unconstitutionally vague and overbroad. Aside from the fact that petitioner argued before the state Supreme Court that Judge Skillman's definition was correct, it is also readily apparent that no claim of vagueness or overbreadth was raised or presented below. Since the issue was not raised before the state courts, it should not be cognizable in this Court. *Ellis v. Dixon*, 349 *U.S.* 458, 460 (1955).

Furthermore, respondent submits that the state statutory definition, if not the functional equivalent of the federal test, is sufficiently certain to pass constitutional vagueness and overbreadth standards either facially or as applied in this matter. The reasoning of the dissent concerning the definition of contempt, as incorporated in the state Supreme Court's opinion, requires an immediate and direct tendency to obstruct. It was this standard which the state Supreme Court indicated that it applied on *de novo* review pursuant to *N.J.Ct.R.* 2:10-4. The term "tendency" in this context obviously contemplates a conscious act designed to obstruct or readily resulting in the obstruction of the proceedings. But as noted, this tendency must be direct and immediate. Judge Skillman emphasized that the threat must be imminent, not merely likely, before the necessity for invocation of the contempt power can arise. Thus, inclusion of the term tendency does not significantly broaden the definition of contempt, particularly when we examine the definition of the term obstruction. Even the federal courts utilize the term "obstruction of the administration of justice" to encompass any act in the presence of the court that interrupts the orderly process of the administration of justice, disrupts a hearing or thwarts the judicial process. *E.g.*, *Vaughn v. City of Flint*, 752 *F.*2d 1160, 1167 (6th Cir. 1985). Petitioner's argument that there would have been no obstruction of the proceeding in this case if the court had not reacted to the disturbance is disingenuous. Obstruction entails the observation by the court of misconduct disrupting the proceedings. Indeed, this Court limits the summary contempt power to

> charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent "demoralization of the court's authority * * * before the public.

In re Oliver, 333 *U.S.* 257, 275 (1948), quoting *Cooke v. United States*, 267 *U.S.* 517 (1925).

The types of behavior that may cause a disruption vary across a broad spectrum. (See Pa41-42). Given this wide gamut of misconduct that may occur in a variety of contexts and with varying degrees of intensity, it has been found practicable to accord some sound measure of discretion in our judges to deal with obstructive behavior, guided by case-by-case examples of the sound exercise of discretion. This discretion is implicit in the definitional language of contempt, even under the federal contempt statute. Its presence does not render these definitions vague or overbroad in the legal sense, since it does not chill protected speech. Indeed, since the common law definitions of contempt are utilized in a majority of jurisdictions (see respondent's merits brief to the New Jersey Supreme Court at pp. 21 to 24), it is plain that there has been no real question about the meaning of this language. In those cases which have directly raised and addressed this issue, similar contempt statutes have been upheld against vagueness and overbreadth challenges. *E.g.*, *Matter of Paul*, 28 *N.C. App.* 610, 222 *S.E.*2d 479, 485 (1976), *cert.* den. and app. dis. 289 *N.C.* 614, 223 *S.E.*2d 767 (1976).

Rather than address the standards governing vagueness claims, petitioner diverges into an analysis of this Court's decisions interpreting the limitations of 18 *U.S.C.* § 401(1), arguing that the federal statute has been construed to require an actual obstruction, and deducing that a tendency to obstruct would not be sufficient. While he may be correct in his analysis of federal statutory construction, respondent fails to appreciate how that governs constitutional claims of vagueness and overbreadth.

The federal contempt power was significantly curtailed in the Act of 1831, 4 Stat. 487 (predecessor to 18 *U.S.C.* § 401), which was passed in reaction to the controversial impeachment proceedings against Judge James R. Peck. He had imprisoned and disbarred in a summary proceeding a lawyer who published an indirect, out-of-court criticism

of a decision of the judge then on appeal. See *Perkins Criminal Law*, Chap. 5, sec. 3 at pp. 532-540 (1969). To preclude the perceived abuse Congress limited the federal contempt power to behavior that in some manner "actually obstruct[s] the district judge in 'the performance of judicial duty.'" *In re McConnell*, 370 *U.S.* 230, 234 (1962).

It is clear that in the federal system, Congress has the authority to regulate within limits the use of the contempt sanction by inferior federal courts, this authority arising from Congress' authority as the creating agency of the lower federal courts. *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 *U.S.* 787, 799 (1987); *Michaelson v. United States*, 266 *U.S.* 42, 65-66 (1924). This proposition was first expressed in *Ex parte Robinson*, 86 *U.S.* 505, 509-511 (1873) where in upholding the constitutionality of the 1831 federal act, this Court expressed doubt whether the statute can be held to limit the constitutionally-derived power of this Court, but held that there "can be no question" of its applicability to the lower federal courts which were "created by act of Congress."

In the exercise of the contempt power, however, a distinction has been recognized as between courts of constitutional origin and those of legislative origin. In courts of constitutional origin this power is said to exist independent of statute. Thus, the power to punish for contempt, including the power to inflict summary punishment, is a right inherent in the courts and is derived from and is essential to the constitutional grant of judicial power. *E.g., Young v. United States ex rel. Vuitton et Fils S.A.*, 481 *U.S.* at 795-796; *see In re Yengo*, 84 *N.J.* at 101, 417 *A.2d* at 1068. Its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of judgments, orders and writs of the court, and consequently, to the due administration of justice. It is an essential element of judicial independence and authority. *See Ex Parte Gowen*, 505 *S.W.2d* 841, 849 (Tex. 1973).

Simply because the federal courts construe the federal statute to require "actual obstruction" does not constitu-

tionalise that phrase. Petitioner's reliance on *In re McConnell*, *supra*, is misplaced, since that decision did not address vagueness and overbreadth claims. *McConnell* involved an adjudication of contempt by a federal district court, and this Court granted *certiorari* with specific reference to its supervisory authority over inferior federal courts to emphasize the "importance of securing alert self-restraint in the exercise by district judges of the summary power of punishing contempt." 270 *U.S.* at 232. This Court proceeded to recite the 18 *U.S.C.* § 401 definition of contempt and its history in federal courts. It was in this context that the Court spoke of the statutory requirement of an actual obstruction of justice:

> And we held long ago, in *Ex parte Hudgings*, that while this statute undoubtedly shows a purpose to give courts summary powers to protect the administration of justice against immediate interruption of court business, it also means that before the drastic procedures of the summary contempt power may be invoked to replace the protections of ordinary constitutional procedures there must be an actual obstruction of justice. . . . (footnote omitted)(270 *U.S.* at 256).

Thus, the quoted language refers to congressional intent manifested in the statute and applies the term "obstruction" in the broad sense utilized in *Ex parte Hudgings*, 249 *U.S.* 378 (1919). There is no indication of any intent to diminish the definition of contempt utilized by state courts. See *Ex Parte Kreppin*, 712 S.W.2d 166, 170 (Tex. App. 1986), cert. den. 479 *U.S.* 1102 (1987).

Petitioner's reliance on *In re Little*, *supra* and *Estes v. Texas*, *supra*, is similarly misplaced. Those decisions were premised on the holding in *Bloit v. Virginia*, *supra*, which permitted a litigant to allege in appropriate motions and argument that a judge was biased. Similar argument by the *pro se* defendant in *Little* was not considered contempt because "[h]e was . . . clearly entitled to as much latitude in conducting his defense as we have held is enjoyed by counsel vigorously opposing a client's cause."

404 *U.S.* at 556. References in *Little* to the Court's opinion in *McConnell* and *Craig v. Harney, supra*, were merely illustrative of the latitude afforded counsel and were not intended to impose the federal statutory definition of contempt on the states. Similarly, Eaton's single isolated usage of street vernacular in answering a question on cross-examination at his municipal court trial was also considered protected by the *Holt* rationale, since it was not directed at the judge or any officer of the court, did not disobey any valid court order, was not loud or boisterous, and did not attempt to prevent the judge or any other officer of the court from carrying out his court duties. *Eaton v. City of Tulsa*, 415 *U.S.* at 699. As Justice Powell clarified in his concurring opinion in *Eaton*,

> But the controlling fact, in my view, and the one that should be emphasized, is that petitioner received no prior warning or caution from the trial judge with respect to court etiquette. It may well be, in view of the contemporary standards as to the use of vulgar and even profane language, that this particular petitioner had no reason to believe that this expletive would be offensive or in any way disruptive of proper courtroom decorum. Language likely to offend the sensibility of some listeners is now fairly commonplace in many social gatherings as well as in public performances.
>
> I place a high premium on the importance of maintaining civility and good order in the courtroom. But before there is resort to the summary remedy of criminal contempt, the court at least owes the party concerned some sort of notice or warning. No doubt there are circumstances in which a courtroom outburst is so egregious as to justify a summary response by the judge without specific warning, but this is surely not such a case. (415 *U.S.* at 701-702).

Thus, it was the absence of any warning or court directive to refrain from such isolated misconduct which underlies the holdings in *Little* and *Eaton*. See also *Hinton*

of Pillsbury, 966 F.2d 22 (9th Cir. 199); *In re Hallinan*, 71 Cal. 2d 1179, 459 P.2d 255, 258, 81 Cal. Rptr. 1, 4 (1969); *State v. Goeller*, 263 N.W.2d 35 (N.D. 1979).

The state Supreme Court addressed this issue and found that petitioner had been expressly warned not to repeat his misbehavior. (Pa52-53). Thus, petitioner could not claim surprise or a lack of familiarity with courtroom etiquette and the necessity for decorum. This is not a case in which the contemnor can claim that the statute was vague or overbroad as applied in that he did not know before the fact that his behavior was punishable: he was expressly warned. Furthermore, petitioner clearly understood the trial judge's perception of his conduct, as demonstrated during his angry tirade in which he admitted most of the conduct. See *Pennsylvania v. Local Union 542, International Union of Operating Eng'rs*, 552 F.2d 498, 512 n. 21A (3d Cir.), cert. den. 434 U.S. 892(1977). As the state Supreme Court found, "there was no inhibition of advocacy here." (Pa58). Moreover, a lawyer who engages in mocking laughter and gestures, jumps up, interrupts and angrily rejects the court's criticism and effort at restoring control, and insults the court in a loud and angry tirade cannot claim an absolute right to First Amendment freedoms. The right of free speech has always been subject to justifiable exception in the courtroom acting to maintain public respect for the institution and to permit the orderly transaction of business. Petitioner's refusal simply does not fall within the type of permissible behavior mentioned by *Holt* and its progeny. Furthermore, petitioner's conduct was not a mere affront to the sensibilities of the trial judge; it directly interrupted, disrupted and interfered with the court in its orderly processing of the business before it, leading to obstruction and delay during which petitioner engaged in an insulting tirade. It was intentionally directed against the dignity and authority of a court.

B. The State Court's Factual Findings Were Sufficient To Support The Contempt Adjudication.

Petitioner argues (at p.20), that "here nothing more than personal disrespect or irritating conduct is involved,

it should not be punished when it falls short of interfering with the nature of the trial." Thus, he asks this Court to overturn the adjudication of contempt allegedly because the facts are insufficient to support the judgment as a matter of law. In this respect petitioner misconceives the role of this Court. It is not the practice of this Court to grant *certiorari* to review evidence and discuss specific facts. *Texas v. Mead*, 465 *U.S.* 1041 (1984) (Stewart, J.); *United States v. Johnston*, 268 *U.S.* 220, 227 (1925).

A federal constitutional claim implicates the due process clause only "if it is found that upon the record evidence adduced at trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 *U.S.* 307, 325 (1979); *Swisher v. United States*, 572 *A.2d* 95, 99 (D.C. App. 1990). Of course, the authority of the states to make the conduct at issue contempt is, as discussed above, a distinct question. The appellate court must review the record in the light most favorable to the prosecution in determining whether a rational factfinder readily could have found petitioner guilty of contempt beyond a reasonable doubt. Thus, petitioner's efforts to minimize his conduct should not weigh in the process. Rather, the facts as found should be the focus of attention. Those facts, which are recited at length in the Counter-Statement of Facts, *supra*, and incorporated here, more than satisfy the *Jackson* standard.

POINT III

THE SUMMARY ADJUDICATION OF CONTEMPT WAS APPROPRIATE AND PETITIONER RECEIVED THE BENEFIT OF ALL PROCEDURAL RIGHTS TO WHICH HE WAS ENTITLED.

Petitioner incorrectly describes the opinion of the state Supreme Court as authorizing summary procedures in unnecessary circumstances. He criticizes this Court for failing to establish with precision the dividing line that marks the constitutional limit of the power to proceed summarily. And he seeks to establish an exception to summary con-

tempt procedures to permit conversion of a direct contempt to an indirect contempt proceeding whenever a contemnor alleges on appeal a factual dispute concerning his "good-faith" explanation for his conduct in *ex parte* supplemental affidavits. Respondent submits that none of these claims warrants the grant of *certiorari*.

At the very outset of its opinion the state Supreme Court acknowledged that necessity is the sole credible basis for the summary contempt process. (Pet.19). Thus, it stressed that

> Necessity not only justifies the summary contempt power, but also limits that power by defining both settings for its exercise and procedural safeguards. *In re Fair Lawn Educ. Ass'n.*, 68 *N.J.* 112, 114-15, 343 *A.2d* 72 (1975). (Pet.29-30).

As the Court explained in *Fair Lawn*,

> . . . since the summary contempt process lends itself to arbitrary action, the power has been increasingly circumscribed, and this in two ways. One is by the careful recourse to the reason for the summary power, *i.e.*, the need for it, to the end that a summary power be not invoked beyond that need. Indeed the statutory categories enlarged to allow evolved out of a grand debate with respect to that underlying necessity. The other safeguard against the risk of arbitrariness consists of procedural requirements designed as antidotes for that risk.
>
> With respect to procedural antidotes, our practice in contempt matters is calculated to limit the risk of arbitrariness and the appearance of arbitrariness. (68 *N.J.* at 118, 343 *A.2d* at 75).

The state Supreme Court also expressly incorporated the standards on the use of the contempt power espoused by the American Bar Association Project on Standards for Criminal Justice, Standards Relating to the Judge's Role in Dealing with Trial Disruptions (May 1971). In listing the steps that a court should follow in evaluating whether

it calls for immediate adjudication, the state Supreme Court focused on the degree of the contempt, alluding to this Court's words in *Cooke v. United States*, *supra*, when it spoke of conduct in open court that would cause "demoralization of the court's authority" before the public. (Pa45). And as related in Point II, *supra*, the state Supreme Court also adopted the reasoning of the dissent in the Appellate Division, which underscored that the conduct must have an immediate and direct tendency to obstruct before the "necessity" for invocation of the contempt power can arise. (Pa139).

In short, petitioner's argument is premised on a misreading of the opinion below, which did not occur in a vacuum but is built upon a lengthy history of compatible state and federal decisional law that is fully protective of the constitutional concerns for due process in instances when the court is called upon to evaluate the necessity for summary punishment. Moreover, petitioner's criticism of this necessity rationale is an exercise in sophistic doublespeak, attacking this Court's test that evaluation the necessity of summary action for failure to consider whether this petitioner would have benefited from "particular" procedural safeguards, while conversely attacking the integrity of the trial court's personal observation of the conduct as discouraging careful consideration of the existence of "necessity" for summary action. Respondent submits that the state courts properly applied the controlling constitutional standards which balance the nature of the liberty interest involved and the degree of reliability required in the fact-finding process. Petitioner's effort to develop a mechanistic definition of necessity is unrealistic and would deprive the courts of the latitude to handle courtroom disruptions that has proven effective in the past.

Petitioner's effort to curtail summary contempt comes at a time when such incidents of attorney misconduct are becoming commonplace. The state Supreme Court alluded to the frequency of such misbehavior, lamenting that the facts before it were "not particularly unusual," and that "[t]hey disclose the kind of incident that might occur any

day in a courtroom." (Pa6). Petitioner's behavior is representative of attorneys who are engaging in discourtesy, abuse, intimidation, and disrespect in the courtroom as a normal strategy, as a technique to wear down the opposition and the court, not as a matter of advocacy but by bullying and insult. If petitioner succeeds in getting this Court to endorse such behavior as acceptable advocacy, the fundamental role of our courts to provide an impartial forum for adjudication of disputes through the process of orderly trial is threatened. In respondent's view petitioner received due process for conduct that was a willful, open defiance of a valid court order, behavior that was rude, intentionally disruptive and a direct and immediate obstruction of the proceeding.

A. Summary Proceedings Pursuant to *N.J. Ct.R.* 1:10-1 Were Necessary and Justified In This Matter.

Essentially, petitioner is asking this Court to apply well established constitutional standards governing necessity for summary adjudication to the particular facts of this case. He argues that even if his non-verbal laughter and gestures, his jumping up to rudely interrupt the court's description of his misconduct and deny it, and his rejection of the court's criticism on the ground that he was tired of it, constituted an "actual obstruction," his conduct was not so threatening to meet the necessity threshold. Again, he has a mistaken conception of the role of this Court, which does not engage in the practice of superior fact-finding, reviewing evidence and discussing specific facts of state court actions. *Town v. Wood*, *supra*; *United States v. Johnson*, *supra*. All of the judges below agreed that if the underlying conduct occurred as found, the summary judgment of contempt was warranted. As noted previously, a fair review of the evidence in a light most favorable to respondent readily indicates that the state court factfinders could have found petitioner's conduct sufficiently egregious to warrant summary punishment. Petitioner's efforts to minimize his misbehavior should not weigh in this process.

B. Petitioner's *Ex Parte* Affidavits Submitted On De Novo Appeal Were Not Admissible To Convert A Direct Contempt Into An Indirect Contempt.

Petitioner argues that a factual dispute existed concerning his "good-faith" explanation that he intended no disrespect, in that witnesses in the courtroom would have materially contradicted the trial court's characterization of his behavior. Essentially, he contends that he is entitled to utilize *ex parte* affidavits on appeal to convert the proceeding from a direct contempt in *facie curiae* into an indirect contempt that requires a full plenary hearing before another judge. Of course, the admissibility of these *ex parte* affidavits is a question of state evidence law, and does not raise a federal question appropriate for review by this Court. Respondent submits that the state courts properly rejected any evidentiary significance of these affidavits under state law, and this Court is not at liberty to depart from the state appellate courts' resolution of this issue of state law.

Furthermore, in a letter brief opposing respondent's motion to supplement the record with Mr. Simon's affidavit, petitioner conceded (at p.6) that his supplemental affidavits contained material omissions and

> . . . should not be accepted for the truth as to what happened in the courtroom on March 19, 1986, not having been subject to the accepted tests for credibility and trustworthiness. Thus, none of the affidavits offered has any relevance to the basic substantive issue in this appeal.

In light of his concession to the Appellate Division, petitioner's continuing effort to utilize these affidavits as substantive evidence is inexplicable.

In addressing the admissibility of these affidavits, the Appellate Division found,

> [a]fter carefully considering these affidavits and the one submitted by Assistant Prosecutor Simon, we cannot conclude that there was a conflict, the resolution

> of which required additional testimony. Moreover, even if, contrary to our conclusion, further testimony should have been elicited, the time for doing so was at the summary hearing. By choosing instead to rely upon the affidavits, defendant cannot transform the nature of his actions into that of an indirect contempt and thereby secure a plenary hearing to which he was not entitled. (Pa121-122).

Likewise, the state Supreme Court rejected the admissibility of these affidavits, holding that "we must deal with the record as we have it." (Pa14). This Court should also disregard petitioner's extensive references to these inadmissible affidavits. His version of the conversation with Mr. Simon is patent hearsay discredited by Mr. Simon's affidavit. Moreover, petitioner does not offer any rational explanation why a court attendant, who was not looking at or paying attention to petitioner at the time of the incident, is better qualified than a trial judge to determine whether petitioner's language was sarcastic and disrespectful, particularly when the plain words in the trial transcript support the trial judge's certification. Petitioner certainly provides this Court with no basis for stripping the trial judge of his authority to take judicial notice of conduct in his presence, and transforming this matter into an indirect contempt, contrary to state statutes and without any basis in federal law.

Moreover, we disagree with petitioner's contention that his denial of an intent to be disrespectful entitled him to a full plenary hearing before another judge as a matter of constitutional right. Denying a purpose to obstruct the court does not purge the contempt or constitute a defense where the gist of the offense is an overt act of disobedience or disrespect for the authority of the court. See *Clark v. United States*, 289 U.S. 1, 10 (1933); *[illegible] v. United States*, [illegible] F.2d [illegible] ([illegible] Cir. [illegible]). Petitioner's willful intent may be inferred from the facts and circumstances, including his reckless disregard for the court's warnings. *United States v. [illegible]*, [illegible] F.2d [illegible] ([illegible] Cir. [illegible]); *United States v. [illegible]*, [illegible] F.2d

396, 399 (6th Cir. 1973); *Sykes v. United States*, 444 F.2d 928, 930 (D.C. Cir. 1971); *Murphy v. State*, 46 Md. App. 138, 416 A2d 748, 756 (1980). The state Supreme Court understood the frustrations petitioner faced in confronting polygraph evidence that he believed to be unreliable, but held, "[i]t helps to explain his reaction but it does not excuse it." (Pa54). See *United States v. Giovanelli*, 897 F.2d 1227, 1232 (2d Cir. 1990). Petitioner was afforded the opportunity to present any proof of material facts of which the trial court was not aware, but he declined to do so. The facts were not in dispute, and petitioner's belated effort to create a putative issue on appeal do not warrant the conversion of this matter into something that it is not.

POINT IV

PETITIONER WAS NOT ENTITLED TO CONVERT THE SUMMARY HEARING INTO A FULL BLOWN TRIAL BY REQUESTING TO CONSULT WITH COUNSEL.

Petitioner attempts to portray a split of authority among jurisdictions as to whether the federal constitution entitles a person to the representation of counsel at a summary contempt hearing when incarceration is a possible sentencing option. He relies on *Argersinger v. Hamlin*, 407 U.S. 25 (1972) for the proposition that no one may be imprisoned for even a petty offense if the party was denied the right to be represented by counsel. Of course, while the trial court imposed a sentence of two days incarceration as well as the $500 fine, a stay was obtained that same day (Pa207), and the Appellate Division in its judgment vacated the term of incarceration as inappropriate. (Pa180). The state Supreme Court held that the Appellate Division "correctly vacated the jail term." (Pa1). Thus, this is not a case in which the contemnor was ultimately sentenced to a period of incarceration. Petitioner does not face future incarceration since the jail term was vacated, the sentence has been fully executed with the payment of the fine and the appeal is rendered moot. See Point I, supra. He is no standing to claim a right to counsel

based on possible sentencing options, as this right is dependent on the term of incarceration actually imposed. See generally, *Scott v. Illinois*, 440 *U.S.* 367 (1978). Furthermore, respondent submits that the sixth amendment and due process guarantees addressed in *Argersinger* do not extend to require the right to counsel in a summary contempt proceeding.

Contempt proceedings are traditionally characterized as "*sui generis* - neither civil actions nor prosecutions for offenses." *Myers v. United States*, 264 *U.S.* 95, 103 (1924). This Court has repeatedly indicated that the guarantee of right to counsel does not limit the summary contempt power. Thus, in *Cooke v. United States*, *supra*, the Court held that "[t]here is no need of evidence or the assistance of counsel before punishment, because the court has seen the offense." 267 *U.S.* at 534. *Accord*, *In re Oliver*, 333 *U.S.* at 275-276. This Court cited *Oliver* twice in reaching its conclusion in *Argersinger* and was undoubtedly aware of the implications of that decision - that an individual who commits contempt in the presence of the court can be tried instantly and even sentenced to jail, though he may not have been represented by counsel. Indeed, *Cooke* was cited with apparent approval in *United States v. Wilson*, 421 *U.S.* 309, 316 (1975), where one of the contemnors did have counsel present at the time of the adjudication of contempt but it did not appear that counsel participated in the proceedings, and in *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 *U.S.* at 799. This Court has always given every indication that it intends to keep intact the judicial power to punish summarily for contempts except in matters involving "serious contempts" entailing the imposition of a sentence of incarceration exceeding six months, where the right to jury trial and counsel are guaranteed. See, *e.g.*, *Young v. United States ex rel Vuitton et Fils S.A.*, 481 *U.S.* at 799-799.

Most jurisdictions that have considered this exception to the counsel requirement have followed *Oliver* and *Cooke* where the contempt was committed in the presence of the court and summary adjudication was found necessary to

maintain the court's authority. See, *e.g.*, *United States v. Baldwin*, 770 *F.2d* 1550, 1553-1554 (11th Cir. 1985), *cert. den.* 475 *U.S.* 1120 (1986); *Matter of Heathcock*, 696 *F.2d* 1362, 1365 (11th Cir. 1983); *State v. Case*, 100 *N.M.* 173, 667 *P.2d* 978, 981-983 (Ct. App. 1983), *aff'd after rem.* 103 *N.M.* 574, 711 *P.2d* 19 (Ct. App. 1985); *Saunders v. State*, 319 *So.2d* 118, 125 (Fla. Ct. App. 1975); *Skolnick v. State*, 180 *Ind. App.* 253, 388 *N.E.2d* 1156, 1164 (1977), *cert. den.* 445 *U.S.* 906 (1980); for additional cases recognizing the exception to counsel requirement in summary contempt matters, see also *Mann v. Hendrian*, 871 *F.2d* 51, 52 (7th Cir. 1989); *United States v. Anderson*, 553 *F.2d* 1154, 1155 (8th Cir. 1977); *Cirsolo v. Madigan*, 443 *F.2d* 314, 319 (9th Cir. 1971); *Swisher v. United States*, 572 *A.2d* at 91; *In re Ellis*, 264 *A.2d* 300, 305 (D.C. App. 1970).

Petitioner relies upon cases which do not provide any reasoned basis for overturning *Oliver* and *Cooke*. For example, the Pennsylvania Supreme Court in *Commonwealth v. Abrams*, 461 *Pa.* 327, 336 *A.2d* 308 (1975) and *Commonwealth v. Crawford*, 466 *Pa.* 269, 352 *A.2d* 52 (1976) simply held that *Argersinger* controlled without any analysis or consideration of the historic basis for the *Cooke/Oliver* exception and the limited, distinguishable features of a summary contempt hearing. In *Pitts v. State*, 421 *A.2d* 901 (Del. 1980), the court declined to decide the matter on constitutional grounds but held that until the issue was resolved by this Court, it was "better policy" in cases where there was no exigency unduly interfering with trial proceedings to afford counsel to indigent defendants. Thus, *Pitts* is not constitutionally based and does not support petitioner's claim that a conflict exists among jurisdictions. Petitioner's reliance on *In re Grand Jury Proceedings: United States v. Sun Kong Kong*, 468 *F.2d* 1368, 1369 (9th Cir. 1972) is misplaced since it involved a civil contempt proceeding pursuant to 28 *U.S.C.* sec. 1826 against recalcitrant grand jury witnesses who were entitled to the procedural regulations prescribed by *Fed. R. Crim. Proc.* 42(b). Likewise, *Johnson v. United*

States, 344 *F.2d* 401, 411 (5th Cir. 1965) is distinguishable since it also involved a recalcitrant witness and there was a serious question of his mental competence. Furthermore, *Johnson* preceded *Argersinger* and made no reference to *Oliver* or *Cooke*, instead relying on *Johnson v. Zerbst*, 304 *U.S.* 458 (1938) and other similar cases that had nothing to do with contempt. Thus, *Johnson*'s rationale and precedential value are questionable. See *Nelson v. Holzman*, 300 *F. Supp.* 201, 202-203 (D. Or. 1969).

As the Appellate Division explained below, even in the unlikely event that *Argersinger* is read to limit the exercise of the summary contempt power, this is not a case in which such a limitation should apply since petitioner is an experienced trial attorney

> who obviously understood the charges brought against him and could have responded thereto. There was no danger that the complexity of the issues involved or the "assembly-line" nature of the hearing resulted in any prejudice that the presence of outside counsel would have averted. Likewise, defendant here was not indigent or unable to appreciate the consequences of a guilty plea. In short, none of the rationales underlying the holding in *Argersinger* are present here. Thus, *Argersinger* cannot be interpreted as extending the right to counsel to defendant in this case. (Pa147).

The state Supreme Court agreed. (Pa33).

It is also significant that under New Jersey practice broad appellate review serves as a "judicial failsafe against not only trial court abuse, but trial court mistakes as well." *In Re Yengo*, 84 *N.J.* at 135, 417 *A.2d* at 546 (Handler, *J.*, concurring). Since petitioner obtained counsel on appeal, his interests were amply safeguarded: counsel presented argument and addressed sentencing before the reviewing court with no diminution of effectiveness. The normal deference accorded on appeal to factual determinations of the trial court is replaced with suspicion in contempt appeals, where the reviewing court considers the matter *de novo*.